

**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

MICHAEL H. MCCABE, as heir of
SUZANNE MCCABE,

Case No.: 3:24-cv-0438-CSD

Plaintiff

Order

V.

MARTIN O'MALLEY,
Commissioner of
Social Security,

Defendant

Re: ECF Nos. 1, 1-1

Before the court is Plaintiff's application to proceed in forma pauperis (ECF No. 1) and complaint (ECF No. 1-1).

I. APPLICATION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

A person may be granted permission to proceed in forma pauperis (IFP) if the person submits an affidavit that includes a statement of all assets such [person] possesses [and] that the person is unable to pay such fees or give security therefor. Such affidavit shall state the nature of the action, defense or appeal and affiant's belief that the person is entitled to redress." 28 U.S.C. § 1915(a)(1); *Lopez v. Smith*, 203 F.3d 1122, 1129 (9th Cir. 2000) (en banc) (stating that 28 U.S.C. § 1915 applies to all actions filed IFP, not just prisoner actions).

In addition, the Local Rules of Practice for the District of Nevada provide: "Any person who is unable to prepay the fees in a civil case may apply to the court for authority to proceed [IFP]. The application must be made on the form provided by the court and must include a financial affidavit disclosing the applicant's income, assets, expenses, and liabilities." LSR 1-1.

“[T]he supporting affidavits [must] state the facts as to [the] affiant’s poverty with some particularity, definiteness and certainty.”” *U.S. v. McQuade*, 647 F.2d 938, 940 (9th Cir. 1981)

1 (quoting *Jefferson v. United States*, 277 F.2d 723, 725 (9th Cir. 1960)). A litigant need not “be
 2 absolutely destitute to enjoy the benefits of the statute.” *Adkins v. E.I. Du Pont de Nemours &*
 3 *Co.*, 335 U.S. 331, 339 (1948).

4 A review of the application to proceed IFP reveals Plaintiff cannot pay the filing fee;
 5 therefore, the application is granted.

6 II. SCREENING

7 “[T]he court shall dismiss the case at any time if the court determines that-- (A) the
 8 allegation of poverty is untrue; or (B) the action or appeal-- (i) is frivolous or malicious; (ii) fails
 9 to state a claim upon which relief may be granted; or (iii) seeks monetary relief against a
 10 defendant who is immune from such relief.” 28 U.S.C. § 1915(e)(2)(A), (B)(i)-(iii).

11 Dismissal of a complaint for failure to state a claim upon which relief may be granted is
 12 provided for in Federal Rule of Civil Procedure 12(b)(6), and 28 U.S.C. § 1915(e)(2)(B)(ii)
 13 tracks that language. As such, when reviewing the adequacy of a complaint under this statute, the
 14 court applies the same standard as is applied under Rule 12(b)(6). *See e.g. Watison v. Carter*, 668
 15 F.3d 1108, 1112 (9th Cir. 2012) (“The standard for determining whether a plaintiff has failed to
 16 state a claim upon which relief can be granted under § 1915(e)(2)(B)(ii) is the same as the
 17 Federal Rule of Civil Procedure 12(b)(6) standard for failure to state a claim.”). Review under
 18 Rule 12(b)(6) is essentially a ruling on a question of law. *See Chappel v. Lab. Corp. of America*,
 19 232 F.3d 719, 723 (9th Cir. 2000) (citation omitted).

20 The court must accept as true the allegations, construe the pleadings in the light most
 21 favorable to the plaintiff, and resolve all doubts in the plaintiff’s favor. *Jenkins v. McKeithen*,
 22 395 U.S. 411, 421 (1969) (citations omitted). Allegations in pro se complaints are “held to less
 23

1 stringent standards than formal pleadings drafted by lawyers[.]” *Hughes v. Rowe*, 449 U.S. 5, 9
 2 (1980) (internal quotation marks and citation omitted).

3 A complaint must contain more than a “formulaic recitation of the elements of a cause of
 4 action,” it must contain factual allegations sufficient to “raise a right to relief above the
 5 speculative level.” *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). “The pleading
 6 must contain something more … than … a statement of facts that merely creates a suspicion [of]
 7 a legally cognizable right of action.” *Id.* (citation and quotation marks omitted). At a minimum, a
 8 plaintiff should include “enough facts to state a claim to relief that is plausible on its face.” *Id.* at
 9 570; *see also Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

10 A dismissal should not be without leave to amend unless it is clear from the face of the
 11 complaint that the action is frivolous and could not be amended to state a federal claim, or the
 12 district court lacks subject matter jurisdiction over the action. *See Cato v. United States*, 70 F.3d
 13 1103, 1106 (9th Cir. 1995); *O'Loughlin v. Doe*, 920 F.2d 614, 616 (9th Cir. 1990).

14 Plaintiff’s complaint names the Commissioner of Social Security, and requests review of
 15 the Commissioner’s final decision. (ECF No. 1-1.)

16 Federal courts have sole jurisdiction to conduct judicial review of the Social Security
 17 Administration’s determination in this regard. *See 42 U.S.C. § 405(g)*. Upon a review of
 18 Plaintiff’s complaint, it appears administrative remedies have been exhausted with the Social
 19 Security Administration. Therefore, Plaintiff’s complaint shall proceed.

20 **III. CONCLUSION**

21 (1) Plaintiff’s application to proceed IFP (ECF No. 1) is **GRANTED**. Plaintiff is
 22 permitted to maintain this action without the necessity of prepayment of fees or costs
 23 or the giving of security therefor.

(2) The complaint shall **PROCEED**. The Clerk shall **FILE** the complaint (ECF No. 1-1).

(3) The complaint shall be served on the Commissioner in accordance with Rule 3 of the Supplemental Rules for Social Security Actions under 42 U.S.C. § 405(g).

(4) Plaintiff shall serve upon defendant(s) or, if an appearance has been entered by counsel, upon the attorney(s), a copy of every pleading, motion or other document submitted for consideration by the court. If Plaintiff electronically files a document with the court's electronic filing system, no certificate of service is required. Fed. R. Civ. P. 5(d)(1)(B); LR IC 4-1(b); LR 5-1. If Plaintiff mails the document to the court, Plaintiff shall include with the original document submitted for filing a certificate stating the date that a true and correct copy of the document was mailed to the defendants or counsel for the defendants. If counsel has entered a notice of appearance, Plaintiff shall direct service to the individual attorney named in the notice of appearance, at the physical or electronic address stated therein. The court may disregard any document received by a district judge or magistrate judge which has not been filed with the Clerk, and any document received by a district judge, magistrate judge, or the Clerk which fails to include a certificate showing proper service when required.

IT IS SO ORDERED.

Dated: October 9, 2024

C S D
Craig S. Denney
United States Magistrate Judge